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ferred, disallowing their respective claims of liens, they appeal. Affirmed, in so far as it denied personal liability on Hotel Rueger, and disallowed the claim of the Warren-Ehret Company, and allowed in part the claim Engleby & Bros., Incorporated, and reversed in so far as it disallowed the liens of H. N. Francis & Co., and others. Remanded, with directions.

H. R. Miller, of Richmond, for appellant, Warren-Ehret Co.

John B. Minor, of Richmond, for appellant, Standard Engineering Co.

S. S. P. Patteson, of Richmond, for appellant, Pittsburg Plate Glass Co.

A. W. Patterson, of Richmond, for appellant, H. N. Francis & Co.

R. E. Scott and Williams & Mullen, all of Richmond, for appellee.

SCHMIDT et al. v. WALLINGER.

June 12, 1919.

[99 S. E. 680.]

1. Parties (§ 92 (3)*)—Misjoinder—Demurrer.—Under Code, 1904, § 3258a, an objection of misjoinder of parties in an action at law cannot be reached by demurrer, but only by motion to abate the action as to the parties improperly joined.

[Ed. Note.—For other cases, see 10 Va.-W. Va. Enc. Dig. 756, 757.]

2. Action (§ 28*)—Tort—Waiver of Tort.—A declaration in assumpsit by a landowner against real estate men for fraudulent profits is not defective because one count alleged a tortious transaction; for the landowner might waive the tort and rely on the implied promise to pay money which in good conscience was hers.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 128; 2 Va.-W. Va. Enc. Dig. 58.]

3. Brokers (§ 38 (3)*)—Secret Profit—Declaration.—A declaration by the owner of city property against brokers whom she had engaged to trade it for farm land, which alleged that they fraudulently misrepresented the price at which the owner of the farm land was willing to dispose of the same, and thus made a secret profit, held not open to demurrer on the ground that it did not aver the brokers were not mere middlemen.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 636.]

4. Brokers (§ 38 (3)*)—Fraud—Declaration—"Scienter."—A declaration by the owner of city property against brokers whom she engaged to trade it for farm land, which alleged that they fraudu-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

lently misrepresented the price at which the owner of the farm land was willing to dispose of the same and thus made a secret profit, held not subject to demurrer on the ground that it did not allege scienter; that is, knowledge by defendants of the falsity of their representations.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Scienter. For other cases, see 6 Va.-W. Va. Enc. Dig. 498.]

5. Evidence (§ 155 (1)*)—Admissibility—Objection.—Defendants cannot complain of the admission of evidence of a compromise offer made by one of their number, where they first brought out such evidence on cross-examination of plaintiff's husband.

6. Exceptions, Bill of (§ 56 (3)*)—Certificate—Construction—Reservation of Exceptions.—Where the trial court certified to a bill of exceptions, but concluded with the statement that neither the stenographer nor the court heard the exceptions, held that, as the duty of determining whether an exception was taken was for the trial court, the exceptions will be treated as having been reserved.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 391.]

7. Appeal and Error (§ 1047 (1)*)—Review—Harmless Error.—The admission or exclusion of evidence which was unlikely to affect the verdict, particularly where neither the trial court nor the reporter were certain whether the exceptions thereto had been taken, was not reversible error.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 595.]

8. Brokers (§ 67 (1)*)—Compensation from Both Parties—Middlemen.—Where an agent stands in the situation of a mere middleman, not having undertaken to act as agent for either party, or to exercise for either his skill, knowledge, or influence, but merely to bring the parties together to deal for themselves, he may recover from each, but to stand in the position of a middleman he must have limited his service to the bringing of the parties together, and where the broker, in disregard of his duty, conceals an adverse interest or secretly enters into the service of another, he not only forfeits his right to commissions, but must account for gains unlawfully acquired, etc.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 637, 641.]

9. Brokers (§ 38 (6)*)—Middlemen.—Brokers employed by the owner of city property to effect an exchange of the same for farm land held not middlemen, though the owner of the city property authorized them to receive a commission from the owner of the farm land in effecting the exchange, and hence, where they misrepresented to the owner of the city property the price of the farm land, an in-

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struction in an action to recover secret profit thus obtained was not objectionable in failing to present the question whether such brokers were middlemen.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 637.]

10. Brokers (§ 38 (6)*)—Actions—Instructions.—In an action by the owner of city property against brokers whom she had engaged to exchange the same for farm land, based on the ground that they fraudulently misrepresented the price at which they could obtain the farm land, and thus made a secret profit, the brokers cannot object that, in an instruction submitting the question whether the execution of a second deed to the city property which named one of the brokers as grantee was a ratification of the entire transaction, the court inserted the question whether the owner was acting with full knowledge of all the facts.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 232.]

11. Brokers (§ 38 (6)*)—Actions—Instructions.—In an action by plaintiff, the owner of city property, against brokers whom she had engaged to exchange her property for farm land, and whom she claimed had made a secret profit by misrepresenting the price at which the land could be acquired, the refusal of an instruction requested by the brokers held proper because disregarding plaintiff's theory and the rule of law that brokers in such cases must act openly and in good faith.

[Ed. Note.—For other cases, see 16 Va.-W. Va. Enc. Dig. 237.]

12. Trial (§ 327*)—Action by Brokers—Verdict—Sufficiency.—In an action brought against three brokers who were associated together in a transaction, although one of them was doing business under a firm name, a verdict against the firm and the two individual brokers held sufficient to support a judgment against the three jointly and severally, and not to be open to objection on the ground that it found the existence of a partnership between the three brokers which in point of fact did not exist.

Appeal from Circuit Court of City of Richmond.

Action of assumpsit by Amelia C. Wallinger against E. F. Schmidt and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

L. O. Wendenburg, of Richmond, for plaintiffs in error.

Haw & Haw, of Richmond, for defendant in error.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.